Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

LLOYD HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the 120-day service requirement of Federal Rule of Civil Procedure 4 supplants the forthwith service requirement found in the Suits in Admiralty Act ("SAA").

II. If the 120-day service requirement of Rule 4 does not supplant the forthwith service requirement found in the SAA, whether district courts may extend the time for service provided by the SAA under appropriate circumstances.

LIST OF ALL PARTIES

Petitioner:

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Respondent:

UNITED STATES OF AMERICA
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Department of Justice
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REFERENCE TO THE OPINIONS OF THE COURTS BELOW

Court of Appeals Opinion: 51 F.3d 574 (5th Cir. 1995) – Reproduced in Appendix

District Court Order: Reproduced in Appendix

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its opinion on May 10, 1995. Petitioner did not file a motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Suits in Admiralty Act, 46 U.S.C. § 742

Libel in personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney

General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Rules Enabling Act, 28 U.S.C. § 2072

Rules of procedure and evidence; power to prescribe.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Fed. R. Civ. P. 4 (d) (4) and (5)[1]

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

Fed. R. Civ. P. 4 (j)[2]

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of

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[1] These subsections were amended in 1993 and renumbered as Rule 4 (i).

[2] The 1993 amendments reworded this subsection and renumbered it as Rule 4 (m).

the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

STATEMENT OF THE CASE

Petitioner Lloyd Henderson sustained injuries on August 27, 1991, while employed by the United States as a seaman aboard the M/V DELMONTE, a ship owned by the United States (R 3-4). After exhausting administrative remedies, he filed suit against the United States on April 8, 1993, in the United States District Court for the Southern District of Texas, Galveston Division (R 2).[3] Jurisdiction arose under the Suits in Admiralty Act ("SAA"), 46 U.S.C. § 741-752 and the Public Vessels Act, 46 U.S.C. §§ 781-790.

Mr. Henderson experienced a series of difficulties obtaining a proper summons for the United States from the district clerk's office (R 163). As a result, Mr. Henderson did not serve his complaint via certified mail on the United States Attorney General until May 19, 1993, over a month after filing suit (R 163). The summons intended for the United States Attorney, however, was still not in proper form at that point because the deputy district clerk had failed inadvertently to place the seal of the

[3] On motion by the United States, the case was later transferred to the Eastern District of Texas, Beaumont Division (R 1).

court on the summons. A state constable noticed the defect and, after a further series of difficulties with the district clerk's office, Mr. Henderson finally obtained a properly sealed summons on August 25, 1993, just two days before the statute of limitations elapsed (R 164).

Mr. Henderson then filed a motion seeking an extension of time in which to serve the United States Attorney (R 12-13). The district court, after presumably finding good cause as required by Rule 4, granted the extension and rendered an order allowing service on or before September 15, 1993 (R 16). The United States Attorney received personal service on September 3, 1993. Thereafter, the United States moved to dismiss the case for want of jurisdiction due to a lack of "forthwith" service as required by the SAA (R 34). The district court originally denied the motion, presumably believing that Rule 4 governed the time for service in the case and that the court had the power to grant an extension (R 107). Following the court's ruling, however, the Fifth Circuit delivered its opinion in *United States v. Holmberg*, holding that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States. 19 F.3d 1062 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 482 (1994). The district court reconsidered its ruling in light of *Holmberg* and granted the government's motion to dismiss without prejudice but after the statute of limitations had elapsed (R 189). Mr. Henderson appealed to the Fifth Circuit to no avail. The Fifth Circuit merely reiterated its opinion in *Holmberg* that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Conflicts with Third Circuit Precedent.

The manner of service on the United States under the SAA and Rule 4 is the same. Both require that the plaintiff personally serve the United States Attorney for the district in which the suit is filed[4] and, additionally, serve the Attorney General by mail.[5] Rule 4 and the SAA collide, however, with respect to the time for service on the United States. The SAA fails to provide any specific time for service on the United States, but rather simply provides that service be "forthwith." Rule 4, on the other hand, provides a specific time limit of 120 days in which to accomplish service and permits the district court to extend the time upon a showing of "good cause."

Thus the question of which rule regarding the time for service on the United States arises in suits brought under the SAA. The Third Circuit has determined that Rule 4's 120-day requirement supersedes the SAA's forthwith requirement. *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985). Several district courts have held likewise. *E.g., Libby v. United States*, 657 F. Supp. 1251, 1252 (M.D. Fla. 1987), *aff'd*, 840 F.2d 818 (11th Cir. 1988); *Phillips v. United States Army Corps of Engineers*, 629 F. Supp. 967, 971 (S.D.

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[4] After the filing of this suit, Congress amended Rule 4 to permit the United States Attorney to designate agents to receive process and to permit service on the United States Attorney by mail.

[5] The SAA specifies registered mail; Rule 4 permits registered or certified mail.

Miss. 1986). Other circuits addressing the issue, however, have concluded that the SAA's forthwith requirement applies regardless of Rule 4's 120-day requirement. *E.g. City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708, 710 (2d Cir. 1960); *Owens v. United States*, 541 F.2d 1386, 1388 (9th Cir. 1976), *cert denied*, 430 U.S. 945 (1977); *Holmberg*, 19 F.3d at 1065.

For the most part, the conflict arises from the determination of whether the SAA's forthwith service requirement is substantive or simply procedural. Those courts that consider the forthwith requirement substantive hold that it applies without regard to Rule 4 because the Federal Rules of Civil Procedure do not modify substantive rights. *E.g., Battaglia v. United States*, 303 F.2d 683, 686 (2d Cir.), *cert. dism'd*, 371 U.S. 907 (1962). Those courts that consider the forthwith service requirement procedural hold that Rule 4's 120-day requirement supplants the SAA's forthwith requirement because the Federal Rules supplant all conflicting procedural requirements in federal courts. *E.g., Jones & Laughlin Steel*, 772 F.2d at 66.

Significantly, the leading precedents construing the SAA's forthwith requirement were decided *prior to* the application of the Federal Rules to admiralty suits in 1966. *See* Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1029, 1030-1031 (1966). For instance, in *McAllister Brothers*, the plaintiff served process on the United States Attorney more than two months after filing suit. 278 F.2d at 708. The court held that the plaintiff's failure to comply with the SAA's forthwith service requirement deprived the district court of jurisdiction and compelled dismissal. *Id.* at 710.

Two years later in *Battaglia v. United States*, the court reached an even harsher result. 303 F.2d at 683. There, the plaintiff served the United States Attorney on the same day he filed the complaint. The plaintiff failed to serve the Attorney General by registered mail, however, until sometime later. The court construed the SAA to require both forthwith service on the United States Attorney and forthwith service by registered mail on the Attorney General. Accordingly, the court held that the lack of forthwith service warranted dismissal. *Id.* at 686. The rationale for the decision was that the forthwith service requirement constitutes a prerequisite to the United States' waiver of sovereign immunity.

In 1966, Congress amended the Federal Rules of Civil Procedure to apply them to admiralty suits. Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1030-1031. Following the application of the Federal Rules to admiralty suits in 1966, the Ninth Circuit nonetheless adopted the long-held view of the Second Circuit that forthwith service of process constitutes a matter of jurisdiction. *Owens*, 541 F.2d at 1388; *see also Barrie v. United States*, 615 F.2d 829, 830 (9th Cir. 1980) (following *Owens*); *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981) (following *Owens*); *Amella v. United States*, 732 F.2d 711, 713 (9th Cir. 1984) (following *Owens*). More recently, the Eleventh and Fifth Circuits also have adopted the view that forthwith service constitutes a matter of substance unaffected by the Federal Rules. *Libby v. United States*, 840 F.2d 818 (11th Cir. 1988); *Holmberg*, 19 F.3d at 1065; *Henderson*, 51 F.3d at 576.

The Third Circuit, however, has used a more reasonable analysis in part because the other circuits have relied on the law before the Federal Rules applied to admiralty suits. In *Jones & Laughlin Steel*, the plaintiff filed suit on January 18, 1984, and sent notice to the appropriate federal agency the next day but failed to serve the Attorney General and United States Attorney until late March, well within the 120 days required by Rule 4 but not "forthwith" as required by the SAA. 772 F.2d at 66. The court logically concluded that the SAA's forthwith service requirement constituted a matter of procedure rather than substance. *Id.* at 66. In so concluding, the court relied on the fact that Congress unified admiralty procedure and the Federal Rules in 1966. *See* Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1030-1031. Thus, the court reasoned that the provisions for service of process found in Rule 4 should govern service on the United States under the SAA. Specifically, the court held:

> This congressional enactment of a uniform 120-day period for accomplishing service of process [under Rule 4] must be read in light of 28 U.S.C. § 2072, [the Rules Enabling Act] which states that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rule 4(j) therefore supersedes the Suits in Admiralty Act's requirement of forthwith service.

772 F.2d at 66.

At least two district courts have adopted the Third Circuit's reasoning. *Phillips*, 629 F. Supp. at 971; *Libby*, 657 F. Supp. at 1252. Other district courts, though bound by

circuit precedents to the contrary, have expressed agreement with the Third Circuit's construction of the SAA. For instance, in *O'Halloran v. United States*, the court stated: "This Court finds the Third Circuit approach reasonable, particularly in light of the inherently ambiguous nature of the term forthwith. This Court also believes that rejecting the argument that Sec. 742 is jurisdictional leads to a fairer result. However, the Ninth Circuit has considered and rejected this very argument." 817 F. Supp. 829, 832 (N.D. Cal. 1993), *aff'd*, 45 F.3d 436 (9th Cir. 1994). *See also Hall v. Maritime Administration*, Civ. Action 92-3030, 1993 U.S. Dist. Lexis 5753 (E.D. La. 1993) (following Fifth Circuit precedent and concluding "with great reluctance" that plaintiff's complaint must be dismissed). Only this Court can resolve this conflict and mandate a uniform rule for the timely service of process on the United States in suits brought under the SAA.

B. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Frustrates Congressional Intent.

The Fifth Circuit's interpretation of the SAA's forthwith service requirement as substantive, like those of the Second and Eleventh Circuits, fails to capture Congress's intent. Prior to 1916, the government enjoyed immunity from suits alleging damages inflicted by government owned and operated vessels. Recognizing the inequity of declining to compensate those damaged by government vessels, Congress passed the Shipping Act of 1916, later modified in 1920 and renamed the SAA. 39 Stat. 728, 730-31; 46 U.S.C. § 742. The Shipping Act, and the SAA after it, provided that U.S. vessels employed as merchant

vessels would be subject to all laws, regulations and liabilities to which private merchant vessels were subject. *Id.* This provision reveals Congress's consent to suits involving damages inflicted by government vessels and Congress's intent to treat governmental and private vessels equally.

Congress's specific intent in including the forthwith service requirement in the SAA is less clear. In fact, the legislative history of the Act lacks any explanation for the forthwith service requirement. As noted above, some courts have opined that the SAA's forthwith service requirement constitutes an integral part of the government's waiver of sovereign immunity, and that Congress intended that immunity be maintained when service on the government is not forthwith. *E.g., Battaglia*, 303 F.2d at 685; *Kenyon*, 676 F.2d at 1232.

This view of the forthwith requirement stems from the rule of statutory construction that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon v. United States*, 342 U.S. 25, 27 n.5 (1951). No rule of statutory construction requires, however, that each term within a statute waiving immunity be strictly construed. In fact, this Court has noted that narrowly construing specific terms of such a statute can defeat Congress's general intent to waive immunity. For instance, in *Indian Towing Co. v. United States*, this Court warned against "import[ing] immunity back into a statute designed to limit it." 350 U.S. 61, 69 (1955). Echoing this Court's warning in *Indian Towing*, the court in *Weiss v. United States*, emphasized that a presumption in favor of immunity "does not mean that there must be a niggling and

obnubilative adherence to the narrowest meaning of the words of the Act when the patent intent of Congress" is to waive immunity. 168 F. Supp. 300, 301 (D.N.J. 1958).

Even Justice Friendly, who concurred in an opinion holding that the forthwith requirement constitutes an integral part of the government's waiver of immunity, remarked:

> I should have supposed that, once Congress gave the basic consent to sue the United States, as it did in the first sentence of Sec. 2 of the Suits in Admiralty Act, it was content to have the courts decide the effect of various procedural lapses in the same manner as "if such vessel were privately owned or operated." The Act was "a comprehensive waiver by the United States" whereby "the government, in entering the shipping world as a participant, simply assumes a normal role in the antecedent pattern."

Battaglia, 303 F.2d at 686 (citation omitted) (*quoting* Gilmore and Black, *Admiralty* 773-774 (1957)).

Congress's more likely intent for including the forthwith requirement in the SAA was simply to provide a time frame for service because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920. The Federal Rules did not come into effect until 1938 and did not apply to admiralty suits until 1966. *See* 28 U.S.C. § 2072; Amendments to Rules of Civil Procedure for the United States District Courts, reported in 383 U.S. at 1030-31. When the Rules came into effect, Congress expressed in the Rules Enabling Act that all procedural laws in conflict with the new Rules "shall be of no further force or effect." 28 U.S.C. § 2072. Thus, the

Rules supplanted the SAA's forthwith service requirement. This view is reflected by Justice Boochever in his concurrence in *Kenyon*. 676 F.2d at 1231. Specifically, he states:

> [I]f freed from the bounds of stare decisis, I would hold that the service provision of Section 742 [the forthwith requirement] does not constitute an integral part of the substantive waiver of sovereign immunity, but is a mere procedural provision necessary at the time of the statute's enactment, to effectuate that waiver.

Id. at 1232.

The details of service of process are just the type of procedural requirements the Federal Rules of Civil Procedure were designed to supplant. In fact, this Court has previously construed the details of service of process as procedural. In *Hanna v. Plumer*, this Court decided that Rule 4, in allowing substituted service on an executor by leaving the process at his usual place of abode, supplanted a contrary state rule requiring in-hand service upon an executor. 380 U.S. 460 (1965). The rationale behind the decision in *Hanna* was that such details constituted matters of procedure governed by the Federal Rules. *Id*. at 473. Similarly, in resolving a conflict between service provisions found in the Tucker Act, a predecessor of the Federal Tort Claims Act, and Rule 4, the Eastern District of New York determined that the latter governed. *United States v. American Surety Co.*, 25 F. Supp. 700, 702 (E.D.N.Y. 1938). Specifically, the court stated: "It is to be presumed that the Supreme Court considered the problem of whether or not Sections 762 and 763 of 28 U.S.C.A.

[the Tucker Act] were procedural or substantive and concluded that the procedure outlined therein could be altered by the new rules." *Id.*

Concluding that the forthwith service requirement is anything other than procedural seems particularly illogical in light of the other service requirements found in the SAA. Justice Boochever illustrates this point in his concurrence in *Kenyon*:

> Section 742 [of the SAA] specifies even the manner of mailing "by registered mail to the Attorney General of the United States." Certainly that provision is not to be considered as jurisdictional and would be superseded by the Federal Rule provision that states that a copy of the summons and complaint may be sent by "registered or certified mail to the Attorney General of the United States."

676 F.2d at 1232.

Also persuasive in reaching the conclusion that the SAA's forthwith service requirement is merely procedural is the fact that the 1937 notes of the Advisory Committee pertaining to Rule 4 state that the Rule is intended to "provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof." Federal Civil Judicial Procedure and Rules at 22 (West 1995). Additionally, the Advisory Committee listed several federal statutes providing for service on the United States which the Committee believed the Rules superseded. *Id.* at 1252. The SAA did not appear on the list but likely only because the Rules did not then apply to admiralty cases. For these reasons, the more

likely intent of Congress in including the forthwith service requirement in the SAA was merely to provide a procedural guideline in the absence of the Federal Rules. Now that the Federal Rules apply in admiralty suits, they supplant the SAA's contrary forthwith requirement.

Moreover, continuing to allow the government to enjoy the forthwith service requirement, while private owners and operators of vessels are subject to the service requirements set out in Rule 4, defeats Congress's intent in enacting the SAA to place the government on equal terms with private litigants. *See* 46 U.S.C. § 742. In fact, this Court, in interpreting a different provision of the SAA, noted: "Congress has expressly declared that *when sued under the Suits in Admiralty Act the United States is to have its procedural rights determined and governed in the same manner as private parties.*" *United States v. Isthmian S.S. Co.*, 359 U.S. 314, 324 (1959) (emphasis added). The Third Circuit, in deciding that Rule 4 rather than the SAA's forthwith requirement governs the time for service on the United States, similarly relied on Congress's intent in enacting the SAA to treat the United States as a private litigant. *Jones & Laughlin Steel*, 772 F.2d at 64.

C. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Leads to Inconsistent Results.

Application of the forthwith service requirement rather than Rule 4's 120-day requirement leads to inconsistent results because the term "forthwith," in the words of one court is "inherently ambiguous." *O'Halloran*, 817 F.

Supp. at 831. Courts across the country vary widely in their determinations of what is and what is not forthwith service. *E.g., Holmberg*, 19 F.3d at 1065 (holding that service on the United States 106 days following filing suit was not forthwith); *Kenyon*, 676 F.2d at 1231 (holding that service on the United States 60 days after filing suit was not forthwith); *Owens*, 541 F.2d at 1388 (holding that service on the United States 58 days after filing suit was not forthwith); *O'Halloran*, 817 F. Supp. at 831 (holding that service on the United States 77 days after filing suit was not forthwith); *Libby*, 657 F. Supp. at 1253 (holding that service on the United States 21 days after filing suit was forthwith). This bewildering variation among the courts in interpreting the term "forthwith" serves only to confuse litigants.

A panel of the Ninth Circuit, in *Amella*, employed the forthwith service requirement but expressed the opinion that the requirement failed to promote justice. 732 F.2d at 712-13. The court affirmed the dismissal of a case that was not served "forthwith" with these remarks:

> Lawyers unfamiliar with the ways of admiralty or careless on their watch will encounter this statute as a hidden reef that can be a jurisdictional bar to an otherwise meritorious suit. . . . It is a sad case. . . . One of the "problems which a legal system must face is a combination of a due regard for claims of substantial justice with a system of procedure rigid enough to be workable," . . . but Sec. 742 appears to strike the balance too far in favor of formalism, to the detriment of justice. . . . If Congress were to take the statute off the books, we should feel no remorse; but until Congress awakes to action, we are bound by the statutory requirement.

Id. at 712-714 (*quoting* 2 Holdsworth, *A History of English Law* 196 (1909)).

Likewise, the court in *Libby*, when adopting the Third Circuit's holding that Rule 4 supplants the SAA's forthwith requirement stated:

> Adoption of this holding avoids the unnecessary delay and expense of litigation in cases of this type over whether a certain number of days is "forthwith" within the meaning of 46 U.S.C. § 742 [The SAA]. The policies of deciding cases on their merits and fostering judicial economy are better served by the definitive 120 day time limit established by Rule 4(j). . . . [T]his Court can see no reason to judicially maintain [sic] this trap for the unwary.

657 F. Supp. at 1252-53. Only this Court's adoption of Rule 4 in suits under the SAA can end the drastic variations among the lower courts in determining what constitutes forthwith service.

D. This Court Should Grant the Writ Because the Fifth Circuit's Interpretation of the SAA's Forthwith Service Requirement Restricts the District Courts' Power to Extend the Time for Service Under Any Circumstances.

The Fifth Circuit held that the district court's extension of the time for service in this case had no effect because the SAA's forthwith service requirement is jurisdictional in nature. 51 F.3d at 576. In other words, according to the Fifth Circuit, district courts lack the power to

extend the forthwith service requirement under any circumstances. Thus, even an inadvertent failure to serve the United States forthwith cannot be remedied.

Even if the forthwith service requirement applies to suits brought under the SAA, rather than Rule 4, the district courts should maintain the power to extend the time for service in appropriate circumstances. The Fifth Circuit previously addressed an analogous issue in *McCormick v. United States*, 680 F.2d 345 (1982). *McCormick* involved a suit under the SAA brought against the United States after the statutory limitations period had elapsed. The United States argued that because the SAA reflects a waiver of sovereign immunity, the limitations period is jurisdictional in nature and cannot be tolled under any circumstances. *Id.* at 350. The Fifth Circuit rejected the United States' argument, relying heavily on this Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

In addressing the issue of whether a limitations period in a federal statute providing a new cause of action could be tolled, this Court in *American Pipe* concluded:

> [T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

Id. at 559. Heeding *American Pipe*, the Fifth Circuit held in its own decision on the issue:

> We cannot accept the government's position, and the district court's holding, that the SAA limitations provision can never be tolled. We hold that the two-year limitation on suits under the SAA can be tolled under appropriate circumstances where to do so would not defeat the purpose of the provision, which is to encourage those with claims against the United States to present their claims promptly and diligently, and where injustice to the plaintiff would otherwise resul[t]

McCormick, 680 F.2d at 351. Likewise, federal courts should possess the power to extend the forthwith service requirement under the SAA in appropriate circumstances despite the fact that the SAA's forthwith service requirement may be jurisdictional in nature.

In this case, given the difficulties Mr. Henderson faced in serving the United States, the district court considered an extension of time appropriate. The district court's evaluation of the circumstances should be respected even if the forthwith requirement governs the time for service under the SAA. Allowing an extension in appropriate circumstances does not defeat the purpose of prompt service on the United States and protects the plaintiff against injustice when the failure to serve the United States forthwith is inadvertent and dismissal results, as it did here, in a lost cause of action.

CONCLUSION

Petitioner respectfully urges this Court to grant writ in this case and decide that Rule 4's 120-day service requirement supplants the SAA's forthwith service requirement. Alternatively, Petitioner respectfully urges this Court to decide that district courts may extend the time for service provided by the SAA in appropriate circumstances.

Respectfully submitted,

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Attorney for Petitioner

HENDERSON v. UNITED STATES

No. 94-40697, Summary Calendar.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

51 F.3d 574

May 10, 1995, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Texas. D.C. DOCKET NUMBER 1:93-CV-529. JUDGE Joe J. Fisher.

COUNSEL: ATTORNEYS FOR APPELLANT: JIM S. ADLER, P.C., John Ivey, Houston, TX.

ATTORNEYS FOR APPELLEE: Mike Bradford, USA, Olen Kenneth Dodd, Beaumont, TX. Timothy R. Lord, Atty., David V. Hutchinson, Asst. Dir., Torts Branch Admiralty Sect., U.S. DOJ, Washington, D. C.

JUDGES: Before SMITH, EMILIO M. GARZA and PARKER, Circuit Judges. OPINION: PER CURIAM:

Lloyd Henderson filed a personal injury suit against the United States under the Suits in Admiralty Act (the "SAA"), 46 U.S.C. app. §§ 741-752 (1988), and the Public Vessels Act (the "PVA"), 46 U.S.C. app. §§ 781-790 (1988). Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the district court dismissed Henderson's complaint for lack of subject-matter jurisdiction. Henderson appeals the district court's dismissal, and we affirm.

I

Lloyd Henderson, a merchant mariner, was injured while working aboard a vessel owned and operated by the United States. On April 8, 1993, Henderson filed a personal injury suit against the United States under the SAA and PVA. Forty-seven days later, on May 25, 1993, the Attorney General of the United States received by mail a copy of the complaint. On August 30, 1993, Henderson filed a motion for postponement in the district court, in which he claimed that documents necessary to complete service of process on the government had been lost in the mail. The district court granted Henderson's motion, but ordered that he complete service within fifteen days. The United States Attorney for the district in which the action was brought was personally served with the complaint on September 3, 1993, 148 days after Henderson had filed the suit.

The United States moved to dismiss Henderson's suit for lack of subject-matter jurisdiction, arguing that § 742 of the SAA requires that plaintiffs effect service of process in suits brought against the government under the SAA "forthwith." The district court denied the motion without opinion. The United States subsequently renewed its motion to dismiss, citing United States v. Holmberg, 19 F.3d 1062 (5th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 482, 130 L. Ed. 2d 395 (1994). The district court dismissed Henderson's complaint without prejudice for lack of subject-matter jurisdiction.

Henderson appeals, arguing that (1) the district court granted him an extension of time in which to effect service of process on the Government; (2) given the problems he had with the mail, he completed service of process on the Government reasonably forthwith; (3) his service on the Attorney General was forthwith and satisfied the service requirements of § 742; and (4) the district court's dismissal of his complaint violated his right to due process.[1]

II

Service of process on the United States is accomplished by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought and by sending a copy of the summons and complaint to the Attorney General of the United States. Fed.R.Civ.P. 4(i)(1) (previous version at Rule 4(d)(4) (1993)); Peters v. United States, 9 F.3d 344, 345 (5th Cir.1993). At the time Henderson filed his suit, service of process in suits brought under the SAA was governed by two separate timeliness requirements. Rule 4(j) of the Federal Rules of Civil Procedure required that a plaintiff effect service within 120 days after filing the suit. Fed.R.Civ.P. 4(j) (1993) (current version at Rule 4(m)).[2]

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[1] We do not address Henderson's due process claim because the district court dismissed his complaint without prejudice, and Henderson does not argue that a subsequent suit would be time-barred.

[2] At the time Henderson filed his suit, Rule 4(j) read as follows:
If a service of the summons and complaint is not made upon a defendant within 20 days after the filing of the complaint and

Under § 742 of the SAA, however, a plaintiff that has brought suit against the United States under the SAA must effect service of process "forthwith," 46 U.S.C. app. § 742.[3]

We review the district court's dismissal of Henderson's complaint for lack of subject-matter jurisdiction de novo. Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir.1994).

A

Henderson argues that because the district court granted him an extension of time in which to effect service of process on the Government, he was exempt from

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the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. Fed.R.Civ.P. 4(j) (current version at Rule 4(m)). In 1993, Rule 4(j) was replaced by Rule 4(m), which states that:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. Fed.R.Civ.P. 4(m).

[3] Section 742 states in pertinent part that:

The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service. . . .

§ 742's "forthwith" requirement. Under Rule 4(j), the district court was required to dismiss a plaintiff's complaint for failure to meet the 120-day requirement unless the plaintiff showed "good cause" for its failure. While the district court did not expressly find that Henderson had shown "good cause" for being unable to meet the 120-day requirement, the court did grant him a fifteen-day extension.

In United States v. Holmberg, 19 F.3d 1062 (5th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 482, 130 L. Ed. 2d 395 (1994), we addressed the question of whether the forthwith service requirement in § 742 is procedural and, thus, superseded by the Federal Rules of Civil Procedure. We held that the requirement of forthwith service is a condition of the government's waiver of sovereign immunity and, therefore, a jurisdictional prerequisite. Id. at 1064-65; accord Libby v. United States, 840 F.2d 818 (11th Cir.1988); Amella v. United States, 732 F.2d 711 (9th Cir.1984); Battaglia v. United States, 303 F.2d 683 (2d Cir.), cert. dismissed, 371 U.S. 907, 83 S. Ct. 210, 9 L. Ed. 2d 168 (1962). But see Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62 (3d Cir.1985) (holding forthwith service requirement to be procedural). Because § 742's forthwith service requirement is a jurisdictional prerequisite, it is not superseded by the Federal Rules of Civil Procedure and could not have been modified by Rule 4(j). See Holmberg, 19 F.3d at 1064 (holding that Rule 4(j) does not superseded [sic] § 742's forthwith requirement). Thus, the district court's decision to grant Henderson fifteen additional days in which to meet the forthwith service requirement of Rule 4(j) did not affect either the court's

subject-matter jurisdiction or Henderson's obligations under § 742.

B

Henderson contends next that, given his problems with the mail, he completed service of process on the Government reasonably forthwith, and that the district court's implied finding that he showed "good cause" for the delay in service supports his contention. Henderson also cites as support our statement in United States v. Bradley, 428 F.2d 1013 (5th Cir.1970), that in the context of another statute, the term "forthwith" was "deliberately undefined . . . to allow courts to interpret it in a context of 'reasonableness,' on a case by case basis." Id. at 1015. In Holmberg, however, we concluded that "under any definition, service in 103 or 106 days is not forthwith." Holmberg, 19 F.3d at 1065. Thus, even if we interpret the term in a context of reasonableness, and even if the district court found that Henderson showed good cause for the delay, completing service in 148 days is not forthwith.

C

Lastly, Henderson argues that his service on the Attorney General was forthwith and satisfied the service of process requirements of § 742. He contends that "the purpose of the [forthwith] requirement is to provide reasonably prompt notice of the suit to the United States," and that his service on the Attorney General provided the government with that notice. Under § 742, both service of the complaint on the U.S. Attorney and the mailing of a

copy to the Attorney General are required to complete service of process on the government. See § 742. "The word 'forthwith' applies both to the service of a copy of the complaint on the United States Attorney and to the mailing of a copy of the complaint by registered mail to the Attorney General of the United States." 1 Martin J. Norris, The Law of Maritime Personal Injuries, § 8.4 (4th ed. 1990). See, e.g., Battaglia v. United States, 303 F.2d 683, 686 (2d Cir.), cert. dismissed, 371 U.S. 907, 83 S. Ct. 210, 9 L. Ed. 2d 168 (1962) (holding that the term "forthwith" applies to both the service and the mailing). Thus, while we do not address whether Henderson's service on the Attorney General was forthwith, we conclude that Henderson's service on the Attorney General alone did not satisfy the forthwith service requirement of § 742.

III

For the foregoing reasons, we DENY the Government's motion to dismiss Henderson's appeal,[4] but AFFIRM the district court's dismissal of Henderson's complaint.

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[4] In a Motion to Dismiss the Appeal as Unmeritorious, the Government moved for dismissal of Henderson's appeal pursuant to Local Rule 42.2, which provides for the dismissal of certain appeals that this Court finds "frivolous and entirely without merit." Although we affirm the district court's dismissal of his complaint, Henderson's appeal was not frivolous.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LLOYD HENDERSON	*	
	*	
vs.	*	CIVIL NO. 1:93-CV-529
	*	
UNITED STATES	*	
OF AMERICA	*	

ORDER

Pending before the Court is a motion to dismiss for lack of subject matter jurisdiction filed by the defendant, the United States. The plaintiff filed this case under the Suits in Admiralty Act and affected service on the defendant 150 days later. The United States argues that service was not "forthwith," and therefore, the Court lacks subject matter jurisdiction. The plaintiff has filed a response in opposition.

The forthwith service requirement in section 742 of the Suits in Admiralty Act is jurisdictional. *United States v. Holmberg,* 19 F.3d 1062 (5th Cir. 1994). If service is not "forthwith," the district court lacks the requisite subject matter jurisdiction to entertain the action. *Holmberg,* 19 F.3d at 1064-1065. Although "forthwith" has no precise time line, the Fifth Circuit has held that 103 days is not forthwith. *Holmberg,* 19 F.3d at 1065.

Because the plaintiff affected service on the United States 150 days after filing suit, service was not forthwith. Therefore, this court lacks subject matter jurisdiction, and the case must be dismissed. Accordingly, it is

ORDERED that the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction is GRANTED, and the plaintiff's claims against the United States, if any, are DISMISSED without prejudice.

SIGNED this 16 day of June, 1994.

/s/ Joe J. Fischer
UNITED STATES
DISTRICT JUDGE